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A Balancing Approach: State Franchise Law and Federal Trademark Law

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A BALANCING APPROACH: STATE FRANCHISE LAW AND FEDERAL TRADEMARK LAW

INTRODUCTION

In May 1969, William Mariniello and Shell Oil entered a lease and dealership agreement for a service station.[1] Toward the end of the initial three-year lease period, Shell notified Mariniello that the lease would not be renewed. Then, in New Jersey Superior Court, Mariniello initiated an antitrust suit against Shell; he also sought to have the lease reformed to allow him to retain possession of the service station premises. After having the case removed to federal district court, Shell counterclaimed and moved for summary judgment on the lease reformation issue. The district court rejected William Mariniello's arguments that: 1) the lease contract should not be enforced because Shell had violated antitrust laws; and 2) the lease should be reformed because it was an unconscionable contract. The district court granted Shell's motion for summary judgment, finding that termination of the lease was the only issue properly in dispute and that, since Mariniello had not surrendered the premises, no issue of material fact remained to be tried.[2]

Six months later, in *Shell Oil Co. v. Marinello*[3] (hereinafter referred to as *Marinello (S)*), a case involving similar issues between Shell and Frank Marinello, William's brother, the New Jersey Supreme Court held that Shell could not refuse to renew a service-station lease without good cause. The lease-dealership agreement between Shell and Frank Marinello contained a provision which allowed Shell to notify Marinello of its intention not to renew only 10 days prior to the expiration of the lease. The court found the lease and dealership agreement to be part of an integral business relationship (a franchise). The New Jersey legislature had articulated the state's public policy about franchises in the New Jersey Franchise

1. The lease provided for an initial three-year period, followed by renewal each year. It allowed Mariniello to terminate by giving Shell 90 days notice and Shell to terminate by giving Mariniello 30 days notice. It also provided that upon termination Mariniello was to surrender possession of the premises to Shell. Mariniello v. Shell Oil Co., 1973 Trade Cas. 93,478 (D.N.J. 1972).

2. *Id.*

3. 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 94 S. Ct. 1421 (1974). The two brothers spell their surnames differently.

Practices Act.[4] However, the court found the statute was inapplicable to the Shell-Marinello franchise since it had been formed prior to the Act's enactment. Using its common-law power to declare unfair contractual provisions void as against public policy, the court struck the lease termination provision. The court concluded that Frank Marinello's franchise "would have legal existence for an indefinite period of time, subject to his substantially performing his obligations thereunder."[5]

On the basis of the New Jersey Supreme Court's decision, William Mariniello moved to vacate the summary judgment previously granted to Shell by the district court. He argued that the federal district court was bound by New Jersey's common law as announced by the New Jersey Supreme Court in the case involving Frank Marinello and Shell.[6] The district court denied the motion, *holding* that, since Shell's trademark was registered federally under the Lanham Act,[7] and since the Lanham Act gives a trademark owner the right to regulate the use of its trademark, the New Jersey Supreme Court's decision limiting this regulation violated the supremacy clause of the United States Constitution. *Mariniello v. Shell Oil Co.,* 368 F. Supp. 1401 (D.N.J. 1974) (hereinafter referred to as *Mariniello (F)*).

The federal district court did not accept Shell's first argument that the decision in *Marinello (S)* violated the contracts clause.[8] Under the contracts clause, states have power to enact legislation prescribing reasonable contract provisions; however, the states may not apply this legislation retroactively. The New Jersey Supreme Court, in *Marinello (S),* recognized this and accordingly did not reach its decision by applying the Franchise Practices Act to the Frank Marinello-Shell franchise, which was entered into before the Act's passage. Because the

4. Franchise Practices Act, N.J. STAT. ANN. § 56:10-5 (Supp. 1974) requires 60 days written notification, in addition to a showing of good cause, for a franchisor to terminate a franchise agreement.

5. 63 N.J. at 411, 307 A.2d at 603. Some factors indicating "good cause" were: amount of gasoline sold; amount of time the service station was open; and how the premises of the service station were kept. The court accepted the trial court's determination of this issue.

6. The New Jersey common law regarding unilateral termination of service-station leases was announced *after* the grant of Shell's motion for summary judgment. The district court could have denied the motion to vacate on the ground that at the time the motion for summary judgment was granted the district court had correctly interpreted New Jersey law.

7. 15 U.S.C. §§ 1051-127 (1971).

8. U.S. CONST. art. I, § 10.

contracts clause may be used to invalidate a judicial decision only when that decision has directly implemented a statute, the federal district court in *Mariniello (F)* concluded the contracts clause question could not be reached.

The federal district court did accept Shell's second argument, that the New Jersey Supreme Court's decision was not controlling because it violated the supremacy clause.[9] The district court found that the state court, in reaching its decision, must have relied on the Franchise Practices Act rather than the state's common law, since the policies and practical effect of the decision were identical with those of the statute. The district court concluded that *Marinello (S)* was an interpretation of the Franchise Practices Act and the supremacy clause issue could be decided.

According to the district court, the Lanham Act, under which Shell had registered its trademark, was at issue because the Franchise Practices Act defined a franchise to include the licensing of trademarks, including federally registered trademarks. Judge Coolahan, writing for the court, stated that Congress in enacting the Lanham Act had intended to preempt the field of trademark regulation. Consequently the states were without authority to legislate in that area. On this ground, the court found the New Jersey Franchise Practices Act to be invalid.

The court also found that the decision in *Marinello (S)* violated the supremacy clause because it conflicted with the Lanham Act. The Lanham Act gives the owner of a registered trademark the right to use the trademark and to prevent others from using it.[10] By extending the service-station lease beyond the date on its face, New Jersey had changed the trademark licensing term from a definite to an indefinite period of time. According to the district court, this constituted "both a substantive enhancement of the franchisee's rights in the trademark, and a corresponding substantive impairment of the franchisor-registrant's rights in his trademark."[11] Citing *Gibbons v. Ogden*,[12] the court concluded that the "irreconcilable conflict" between New Jersey law and the federal Lanham Act demanded the invalidation of the

9. *Id.* art. VI, cl. 2.
10. *See* 368 F. Supp. at 1405-06; 15 U.S.C. § 1114(1) (1971).
11. 368 F. Supp. at 1406.
12. 22 U.S. (9 Wheat.) 1 (1824).

state statute and the state court's decision.[13] Because Congress had intended to preempt the field of trademark regulation, and because New Jersey law conflicted with the Lanham Act, the district court held that *Marinello (S)* and the New Jersey Franchise Practices Act could not be applied to the owners of federally registered trademarks.

I. The Legal Response to Franchising Abuses

Franchising in the United States expanded from an estimated 50,000 franchises in 1955 to 600,000-700,000 in 1970.[14] It now accounts for about 12 percent of the gross national product and 30 percent of annual retail sales.[15] Franchising has become popular because it combines the most advantageous features of both large and small business. Those who otherwise might not be able to own a business are given an opportunity to operate one. The franchisee's initiative, enthusiasm, and customer contact are important contributions to the arrangement. The franchisor, in turn, provides an established market, economies of scale resulting from a large distribution system and the practical knowledge for operating a business. Although franchising arrangements may vary greatly, all involve "a license from the owner of a trademark or trade name, the franchisor, permitting another, the franchisee, to market a product or service under the franchisor's name or mark."[16]

That a large national franchisor may be able to abuse franchising agreements because of the unequal bargaining powers of the parties has been recognized by commentators,[17] courts and legislatures. Beginning in the 1960's, many franchisors were found to have abused the franchising arrangement by violating antitrust laws. In *FTC v. Texaco, Inc.*,[18] *Atlantic Refining Co. v. FTC*,[19] and *Shell Oil v. FTC*,[20] oil com-

13. 368 F. Supp. at 1407.

14. Lightman, *Economic Aspects of Trademarks in Franchising*, 14 IDEA 481 (1971).

15. *Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. 1 (1973).

16. *Id.* at 5.

17. *E.g.*, Brown, *Franchising*, 33 OHIO ST. L.J. 517 (1972); Brown & Cohen, *Franchise Misuses*, 48 NOTRE DAME LAW. 1145 (1973); *Symposium—The Franchise Relationship*, 33 OHIO ST. L.J. 641 (1972).

18. 393 U.S. 223 (1968).

19. 381 U.S. 357 (1965).

20. 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

panies were found to have forced their franchised dealers to purchase tires, batteries and accessories. The Court found that the standard one year service-station lease allowing cancellation on short notice gave the oil companies an unfair advantage in the relationship. The threat of lease cancellation by the oil companies constituted sufficient "coercion" to support a finding of unfair trade practice in violation of section five of the Federal Trade Commission Act. Franchisors also have been found to have violated section one of the Sherman Act through illegal tying agreements,[21] resale price maintenance,[22] and "horizontal" territorial restrictions.[23]

Legislatures also have become aware of the disproportionate power of the parties to a franchise agreement.[24] In Congress several bills have been introduced and hearings have been held, but only legislation regulating automobile franchising has been enacted.[25] Recognizing the potential for abuse of franchising, some states have enacted legislation. The state statutes range from those requiring franchisors to disclose all franchise terms to prospective franchisees[26] to those requiring enumerating the circumstances in which franchise agreements may be terminated unilaterally by franchisors.[27] Courts now are deciding whether this legislation is constitutional. Both the Puerto Rico Franchise Law and the Delaware Franchise Security Law have been found

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21. *E.g.,* Warring Hermetics, Inc. v. Copeland Refrigeration Co., 463 F.2d 1002 (5th Cir.), *cert. denied,* 409 U.S. 1086 (1972); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

22. *E.g.,* Simpson v. Union Oil Co., 377 U.S. 13 (1964).

23. *E.g.,* Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F.2d 1080 (7th Cir. 1970), *cert. denied,* 401 U.S. 923 (1971).

24.

> Whereas, the relationship between franchised distributors and their suppliers and licensors is marked by economic dependence of the franchised distributor; and Whereas, the suppliers and licensors of franchised distributors have terminated franchises on short notice without just cause, and have threatened and continue to threaten such termination; and Whereas, such unjustified terminations unfairly deprive franchised distributors of their equity and the fruits of their labor after they have created a favorable market for the products, trademarks and trade names of their suppliers and licensors; and . . . Whereas, these detrimental conditions cannot be remedied through bargaining because of the franchised distributors' lack of bargaining power . . . .

Preamble to Franchise Security Law, DEL. CODE ANN. tit. 6, § 2551 (Supp. 1970).

25. Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-22 (1971).

26. MINN. STAT. ANN. § 80C.06(5) (Cum. Supp. 1974).

27. *E.g.,* Conn. Public Act No. 74-292 (Conn. Leg. Serv. Feb. Sess. 1974); Franchise Security Law, DEL. CODE ANN. tit. 6, §§ 2551-57 (Supp. 1970); Franchise Practices Act, N.J. STAT. ANN. § 56.10-5 (Supp. 1974); Franchise Investment Protection Act, WASH. REV. CODE § 19.100 (Supp. 1973).

to be unconstitutional impairments of the obligation of contracts because of their retroactive application. The damage remedy of the Delaware Franchise Security Law also has been found to deprive franchisors of property without due process of law.[28] The federal district court in *Mariniello (F)* is the only court to have considered the constitutionality of state legislation controlling franchise termination provisions.

The franchisor's termination or nonrenewal of a lease with only short notice to the franchisee may be thought of as an abuse of the franchising system independent of any antitrust violations. Before a franchisee acquires a franchise, he must make an investment in the business, and after the franchise is acquired, he must expend his labor to build up business. "Surely no person would make the kind of investment in money, time, and effort as did [the franchisee] without the reasonable expectation that if he substantially performed his obligations to [the franchisor] the latter would continue to renew his lease and dealership."[29]

The franchisee rarely improves his bargaining position with the franchisor since the only real asset he has is the goodwill developed at the site of the business. He usually must accept the lease-dealership contract with short-term termination provisions as drafted by the franchisor. Although the expense and inconvenience of locating a new franchisee may deter the franchisor from terminating the franchise, the franchisee has more to lose economically upon termination of the franchise. Consequently the franchisor uses the short-term cancellation provisions more often than does the franchisee. By forbidding termination or nonrenewal except for "good cause," the New Jersey Supreme Court in *Marinello (S)* tried to remove the element of capriciousness and "unfair surprise" which had been evident in franchise terminations.

The district court in *Mariniello (F)* nullified New Jersey's attempt to use both common law and legislation to control unilateral franchise termination by franchisors. Other than the New Jersey Supreme Court, only one court had tried to remedy the problem of franchise termination abuse by using common-law doctrines.[30] Because

28. Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19 (Del. 1971); Fornais v. Ridge Tool Co., 423 F.2d 563 (1st Cir. 1970) (Puerto Rico law).

29. Shell Oil Co. v. Marinello, 120 N.J. Super. 350, 373-74, 294 A.2d 253, 262 (1972) (trial court's opinion concerning the Frank Marinello-Shell lease).

30. In Mobil Oil Corp. v. Rubenfeld, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (N.Y. City Ct. 1972) the New York City Civil Court described a gasoline franchisor-

of the paucity of judicial decisions in this area, *Mariniello (F)* may be regarded as an important precedent by other courts facing similar issues. If the district court's decision is followed, the states will be powerless to protect franchisees.

II. The Supremacy Clause Analysis

In *Goldstein v. California*[31] the Supreme Court provided two tests, either of which may be used in determining whether a state statute must fail under the supremacy clause: 1) whether Congress intended to preempt the field; or 2) whether the state statute conflicts with federal law. Judge Coolahan, in *Mariniello (F)*, used both tests.

A. *Did Congress Intend to Preempt the Field?*

Judge Coolahan noted that congressional intent may be found on the face of the statute. He thought that Congress' intent in passing the Lanham Act was disclosed in the passage: "to protect registered trademarks used in such commerce from interference by State, or territorial legislation."[32] He found that Congress had fully occupied the field of federally registered trademarks, and that consequently, the states have no authority to legislate in this field. He reasoned that *Marinello (S)* used the Franchise Practices Act to interfere with a trademark owner's relationship with his licensee. Because this relationship was governed by the Lanham Act, he concluded that *Marinello (S)* was inapplicable to owners of federally registered trademarks.

That Judge Coolahan misconstrued congressional intent is apparent from an examination of both the complete declaration of con-

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franchisee relationship as a fiduciary one because the franchisee had entrusted the franchisor with his investment in money and effort, and because of the "great disparity of the parties, the intimacy of their relationship, and the complexity of the transaction." *Id.* at 403, 339 N.Y.S.2d at 636. The franchisor's abuse of this fiduciary relationship led the court to apply equitable principles in dismissing Mobil's petition for repossession of the service station premises after Rubenfeld had refused to vacate at the expiration of his lease. Although an argument was presented on facts similar to those in *Marinello (S)* that a lease should be reformed using common law doctrines, the district court, in Capuano v. Shell Oil, 5 Trade Reg. Rep. ¶ 74,966 (D. Conn. March 7, 1974), reached a decision based on an non-assignment clause of the lease.

31. 412 U.S. 546 (1973).
32. 15 U.S.C. § 1127 (1971).

gressional intent in the Lanham Act and the historical background leading to its enactment. Trademarks, dependent on use and appropriation by their owners for existence, have existed in the common law for many centuries. Prior to 1946, when the Lanham Act was passed, a limited federal registration statute and many state trademark registration statutes were in effect. As explained in the Senate report, the purpose of the Lanham Act was "to place all matters relating to trademarks in one statute . . . to eliminate judicial obscurity, to simplify registration and to make it stronger and more liberal, to dispense with mere technical prohibitions . . . to make procedure simple and relief against infringement prompt and effective."[33] The Lanham Act fulfills these objectives by providing a "federally controlled place of registration" without changing the common law of trademarks.[34] The state interference with trademarks which Congress wished to prevent through the Lanham Act was limited to situations of conflicting state and federal registration,[35] and did not reach, as Judge Coolahan found, all matters which might touch trademarks.

The federal district court in *Mariniello (F)* relied on two cases to support its conclusion that Congress intended to preempt all state legislation which might affect trademarks. However, an analysis of these cases indicates a more limited interpretation of congressional intent. In *Bulova Watch Co. v. Steele,*[36] the question was whether the owner of a federally registered trademark was entitled to an order enjoining the use of his trademark in Mexico by a United States national. In finding he was so entitled, the Court of Appeals for the Fifth Circuit stated that Congress intended to regulate trademarks' use in interstate and foreign commerce to the fullest extent. Rather than indicating that Congress intended to regulate every event or transaction which might touch upon trademarks, as claimed by Judge Coolahan, this case merely indicates that remedies afforded to the owner of a federally registered trademark are not limited because the trademark infringement has occurred outside the territorial boundaries of the United States.

33. SENATE COMM. ON PATENTS, TRADE-MARKS—REGISTRATION AND PROTECTION, S. REP. No. 1333, 79th Cong., 2d Sess. 1 (1946).

34. Callmann, *The New Trade-Mark Act of July 5, 1946,* 46 COLUM. L. REV. 929, 938 (1946).

35. Derenberg, *At the Threshold of the Lanham Trade-Mark Act,* 37 TRADEMARK REP. 297 (1947).

36. 194 F.2d 567 (5th Cir.), *aff'd,* 344 U.S. 280 (1952).

Where a concurrent use of similar trademarks was found in the sale of only four cases of bourbon, the court in *A. Smith Bowman Distillery, Inc. v. Schenley Distributors, Inc.*,[37] ordered one of the trademarks cancelled. In *Mariniello (F)*, Judge Coolahan used a statement from *Schenley* to support his conclusion about congressional intent: "Congress here intended to regulate all it constitutionally could."[38] However, this statement should be considered in the context of the court's discussion. Because the power to enact the Lanham Act was derived from the commerce power, the question in the case was whether the sale of four cases of bourbon in interstate commerce was sufficient commerce to allow the Lanham Act to be used. In making the above statement, the court in *Schenley* only was referring to Congress' power under the commerce clause.

B. *Does New Jersey Law Conflict with the Lanham Act?*

The district court in *Mariniello (F)* indicated that the extension of a franchise beyond the expiration date of the service-station lease caused New Jersey law to conflict with the Lanham Act because this extension impaired "the franchisor-registrant's rights in his trademark"[39] and at the same time increased the franchisee's rights in that same trademark. The Lanham Act provision allowing "exclusive use" of a trademark by the trademark registrant[40] was interpreted in effect to mean that any state regulation of trademark licensing interfered with that right.

To support this holding the district court relied on *Burger King of Florida, Inc. v. Hoots*[41] and *Mister Donut of America, Inc. v. Mr. Donut, Inc.*[42] In *Burger King*, the question was which of two competing users had the right to use the trademark "Burger King." The court decided that the state registered trademark had established prior usage and, therefore, was valid *only* in those geographic areas where it was used prior to the registration of the competing user under the Lanham Act. In *Mister Donut*, the Court of Appeals for the Ninth Circuit would not allow California law to be used to determine

37. 198 F. Supp. 822 (D. Del. 1961).
38. 368 F. Supp. at 1406.
39. *Id.*
40. *See* 15 U.S.C. § 1057(b) (1971).
41. 403 F.2d 904 (7th Cir. 1968).
42. 418 F.2d 838 (9th Cir. 1969).

priority of trademark use, because to do so would elevate the California statute above the Lanham Act. Both *Burger King* and *Mister Donut* deal with the relationship of state trademark legislation with federal trademark legislation. In contrast *Mariniello (F)* is concerned with the problem of the relationship of state law regulating business with federal trademark law, and, therefore, the district court's use of both cases was inappropriate.

The approach of the district court in *Mariniello (F)* was somewhat analogous to that of the Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*[43] There the Court held that state unfair competition law conflicted with federal patent law where Illinois had prohibited copying of an article unprotected by a patent. The Court reasoned that Congress in enacting patent laws had carefully balanced the interest of encouraging invention against the interest of permitting public access to inventions, and had decided to reward invention by the grant of a 17-year statutory monopoly in exchange for full disclosure of the invention. When a state attempted to protect a nonpatentable invention, it upset this careful balance. Similarly, Judge Coolahan seemed to indicate that the lease extension by the state court afforded new trademark rights to one not within the Lanham Act's protection, thus upsetting the balance Congress had drawn in the Lanham Act.

Whether a *Sears* analysis is still valid is questionable in light of the Supreme Court's later decision in *Kewanee Oil Co. v. Bicron Corp.*[44] In finding that Ohio trade secret law (as distinguished from the unfair competition law in *Sears*) did not conflict with federal patent law, the Court used a new balancing test. Federal patent considerations were balanced against the state interest of protecting trade secrets. The Court concluded that the state interest in keeping its trade secret law outweighed any federal interests, even where the trade secret law protected an unpatented but patentable discovery. The federal-state interest balancing method used by the Court in *Kewanee* may require a result different from that reached by the federal district court in *Mariniello (F)*.

Trademarks, like patents, balance the need for commercial incentive (as manifested by the right for exclusive use of the trade-

43. 376 U.S. 225 (1964).
44. 94 S. Ct. 1879 (1974).

mark) against the need for free use of that same trademark.[45] Unlike patents, where Congress has used a 17-year period to achieve this balance, the trademark balance is always self-maintained because a trademark's duration depends on its proper use, not upon the trademark statute. When the need for exclusive use of the trademark declines to the point where the trademark has become a common term, the right for one owner to use it exclusively ends. With trademarks, unlike patents, an additional interest is present: that of the consumer in identifying the producer or manufacturer and in avoiding mistaking other similar products for the trademarked product. This consumer interest is protected by the trademark owner in two ways: 1) he can bring an action against the infringing trademark user; and 2) he is prohibited from licensing his trademark without sufficient control over the licensee so that uniform quality of the product is insured. If he fails to exercise sufficient control, abandonment of his trademark may be inferred, and he may lose the right of exclusive use of the trademark.

The district court in *Mariniello (F)* may have been concerned with the possibility of state interference with the trademark owner's need to protect his own goodwill or the public interest. However, the New Jersey Supreme Court in *Marinello (S)* did not attempt to change either of these interests. It did not attempt to curb the controls a trademark licensor exerts over his licensee. The state court indicated that the service-station lease would be extended only as long as the franchisee "substantially complied with" the terms of his franchise. The state court found that Frank Marinello had substantially complied with the terms of his franchise agreement. However, in other circumstances a court might find a franchisee's violation of trademark licensing provisions would not meet the substantial compliance test. Good cause for franchise termination then would exist. Since New Jersey would not prevent franchise termination under these circumstances, its law does not impair the rights of a federally registered trademark owner to impose trademark licensing controls upon the franchisee.

A *Kewanee* analysis also requires an examination of New Jersey's interest. The New Jersey legislature, in enacting the Franchise Prac-

45. The analysis of the interest balancing of a trademark is drawn from Goldstein, *The Competitive Mandate,* 59 CALIF. L. REV. 873 (1971).

tices Act, and the New Jersey Supreme Court, in *Marinello (S)*, were attempting to control one aspect of franchising abuse: the unilateral termination of franchise agreements by franchisors. Both the legislature and the court determined that the best interest of the public demanded such control.

The state's interest, as expressed in *Marinello (S)* and the Franchise Practices Act, also coincides with several federal interests. By removing the leverage a trademark licensor is able to exert over his licensee, the state law may facilitate the enforcement of both state and federal antitrust laws. Absent this leverage, the franchisor will be unable to demand anticompetitive behavior from his licensee and fewer antitrust laws may be violated. In addition, state franchising laws may relieve the federal government from the burden of investigating and controlling franchise abuse through FTC action,[46] congressional legislation, or prosecution. Because New Jersey has important interests which do not infringe directly upon the Lanham Act, an analysis consistent with *Kewanee* requires that the state law be allowed to stand.[47]

CONCLUSION

In resolving a supremacy clause question involving patents, the Supreme Court, in *Kewanee*, has indicated that a state-federal interest balancing approach is proper. To resolve supremacy clause questions which involve trademarks, a court should use a similar balancing approach. Both the New Jersey Supreme Court and the New Jersey legislature decided that because franchising is such a prevalent way of doing business, it vitally affects the public interest of the state. Both the court and the legislature recognized that a franchisor may abuse franchising by terminating his franchisee's lease with short notice.

46. *See* FTC Proposed Rule Involving Disclosure Requirements and Prohibitions Concerning Franchising, 4 TRADE REG. REP. ¶ 38,029, at 41,127-2 (Sept. 16, 1974); Consent Order to Cease and Desist, 3 TRADE REG. REP. ¶ 20,716, at 20,585 (Sept. 17, 1974).

47. Because the district court in reviewing its grant of summary judgment to Shell discussed only the Lanham Act, this article has been limited to an analysis of trademark preemption. Other issues which must be considered are: 1) whether Shell's alleged violation of antitrust laws would be sufficient defense to prevent enforcement of the lease contract; and 2) the relationship of state contract law with federal trademark law.

Both decided to intervene in the franchising contract to protect the relatively powerless franchisee who must otherwise accept the lease as offered to him by the franchisor. Both found the solution in requiring good cause for unilateral termination of franchises by franchisors.

Since a franchise includes trademark licensing, state regulation of franchising may touch upon federal trademark law—the Lanham Act. The federal government has an interest in preserving the effectiveness of the Lanham Act and in protecting the benefits a trademark owner derives by registering his trademark under the Lanham Act. However, the New Jersey Franchise Practices Act and the decision in *Marinello (S)* do not fail under the supremacy clause because of the Lanham Act. Congress did not intend to preempt the field of all state legislation touching trademarks. Nor does the New Jersey statute or decision conflict with the purpose or operation of the Lanham Act. Because New Jersey law does not conflict with the Lanham Act and because New Jersey has important interests in retaining franchise controls, its law, as stated in *Marinello (S)* and the Franchise Practices Act, should be allowed to stand.

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